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Supreme Court of the United States

October Term 1958

No. 511

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

—against—

The steamtug LONG BRANCH, the RAILWAY CARFLOATS No. 61 and 50, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

(and three related causes)

REPLY BRIEF OF PETITIONERS DEEP SEA TANKERS, LIMITED, AND SHELL OIL COMPANY, INCORPORATED, TO THE BRIEFS IN OPPOSITION OF RESPONDENTS CENTRAL RAILROAD COMPANY OF NEW JERSEY AND METROPOLITAN SAND & GRAVEL CORPORATION

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Respondents, Central Railroad Company of New Jersey and Metropolitan Sand & Gravel Corporation, filed separate briefs in opposition to the petition herein. The briefs in opposition are basically the same and this reply is addressed to both.

The two respondents assert argumentative questions of fact and their briefs do not meet the questions of law presented in the petition. The petition does not seek a

review of fact, but asks that this Court consider questions of law concerning limitation of liability. There is a conflict in interpreting the statutory terms of the Limitation of Liability Act with resulting conflicts between Circuits. Questions of great importance to both domestic and foreign shipowners are presented to this Court. For this reason the petition for a writ of certiorari should be granted. Indicative of the widespread interest in the right to limit liability is the fact that a few days after the petition was filed, another petition was filed which also presents a question arising under the Limitation of Liability Act and relating to the construction of the standard of "privity or knowledge" provided by the Act. (*States Steamship Company* v. *United States, et al.*, No. 514, October term, 1958.)

Instead of meeting the issues, one respondent[1] asserts that petitioners "fail to reveal" that there was no physical contact between the vessels. Yet the petition (pp. 4, 6) makes it clear that this is a grounding case; a case where the respondents' vessels forced the Rincon Hills off her course.

The same respondent asserts (p. 3) that petitioners "fail to state the fact that the wheelsman on the Rincon Hills was *given an order of full ahead* and hard left . . ." Not only is this not an issue, but the statement is as careless as it is inaccurate. The error *in extremis* was specifically referred to in the petition (p. 6), and, furthermore, the helmsman neither received an order of full ahead nor did he execute it. This was done by the Watch Officer.

The other respondent[2] claims that it "should be permitted to show" that its tow did not block the range or otherwise embarrass the navigation of the Rincon Hills. Surely this is no answer to the petition, and it pertains solely

[1] Jersey Central Railroad brief, p. 3.
[2] Metropolitan brief, p. 3.

to a question of fact decided against respondent by the Court of Appeals.

The same respondent also refers (p. 4) to knowledge of currents as a prerequisite to obtaining a license. Yet respondent's own tug captain, Hutton, was not aware of the fact that the current continued to run ebb well over an hour after low water at the Battery; and the same is true as to Captain Molloy of the railroad tug Long Branch (Court of Appeals Finding No. 4, Petitioners' appendix p. 7b). In fact Captain Molloy testified "I don't think I could get a license today because I don't know the speed of the tides" (Appendix to Petitioner's brief in the Court of Appeals, p. 396a).

Respondent Metropolitan also asserts (p. 2) that the failure of respondent to provide its tug with Current Tables was "non-proven". Respondent's assertion is directly contradicted by the statement of the Court of Appeals (Petitioner's Appendix 28b): "The evidence concerning Metropolitan is less clear but it is probable that Charts were available or actually on 'Metropolitan Number 2' *but the Current Tables were not*" (Emphasis added). The missing Current Tables[1] would have supplied the necessary information as to the ebb current, of which current both respondents' tug captains were not aware.

The briefs of both respondents (Metropolitan pp. 4-5, Jersey Central Railroad, pp. 3-4) seek to exploit the comment in the opinion of the Court of Appeals with respect to respondents committing the navigation of their tugs to the captains who were in charge at the time of the grounding. However, both respondents have omitted, in their quotations, the immediately following comment by the Court of Appeals (Petitioners' appendix p. 28b) that:

> "We are still at a loss to understand how Hutton and Molloy miscalculated the current cycle; but the

[1]Current Tables are not to be confused with Navigation Charts.

> mere fact that they did so does not convince us that the failure to make further provision for Charts and Current Tables aboard these tugs was a *wilful fault* by the owners such as to deprive them of the benefits of the Limitation of Liability Act." (Emphasis added.)

It is clear from its own language that the Court of Appeals *did* apply the standard of "wilful fault", which is not the requirement of the Limitation of Liability Act. Respondent Metropolitan claims (p. 3) that the language of the Court of Appeals is "inappropriate", but this argument is based upon semantics and ignores the full effect of the Court's opinion. Both respondents ignored the cases of *Spencer, Kellogg Co.* v. *Hicks*, 285 U. S. 502 (1932); *Henson* v. *Fidelity & Columbia Trust Co.*, 69 F. (2d) 778-779 (1934); and *The Pennsylvania*, 1958 A. M. C. 1775, not yet officially reported. It is also worthy of note that both respondents have also ignored the point that the shipowner has a non-delegable duty to make a ship seaworthy by equipping her with adequate navigational data for the waters in which she navigates. These are issues of law which have widespread application, are of importance to all shipowners and merit review by this Court.

It is suggested[3] that knowledge of currents is not of importance with respect to harbor tugs which do all of their work in New York Harbor. In fact, in narrow, restricted waters such as those here concerned, knowledge of currents and the presence of information on the tug with respect to such currents is of the utmost importance. By contrast, it is a different matter on the high seas where there is sufficient water so that the effect of tidal currents could not bring the ship into danger.

We are confident that this Court's attention will not be diverted from the questions of law presented by the petition with respect to limitation of liability.

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[3] Jersey Central Railroad brief, p. 5.

Respondent Metropolitan proposes (p. 5) that the definition of the term "such vessel" as used in the Limitation of Liability Act, depends upon whether a tort or a contract is involved. In a contract case, the argument runs: The statutory term "such vessel" should be construed as meaning all vessels involved in the contract. If this be so, then in a tort case the statutory term "such vessel" should be construed as meaning all vessels involved in the tort. In the present case, the tortious act was the presence of the flotilla. The tug alone would not have blocked the Rincon Hills.

Metropolitan seems to agree that the question presented to this Court is one of statutory construction. The statute, the Limitation of Liability Act, does not make the distinction urged by Metropolitan. The distinction between contract and tort cases is a Court-made distinction and was designed to limit the unjust rule in the *Liverpool* case. The distinction is important enough to warrant review by this Court.

Central Railroad Company of New Jersey claims (p. 6) that the District Court "exonerated" the carfloats. Actually, the District Court dismissed the libel on the grounds, subsequently reversed, that the carfloats did not crowd the Rincon Hills and that the Rincon Hills grounded solely because of her faulty navigation. The District Court also found as a fact, which was subsequently reversed, that the Metropolitan tug and tow were not in the area. The Court of Appeals, however, found that both flotillas blocked the Rincon Hills, but that the carfloats and scows were not *legally* responsible for blocking the Rincon Hills because they were passive instruments under the control of their respective tugs. The distinction to be noted is that the tows were at fault. They were not "exonerated" in the sense used by respondents, but they could not be required to respond *in rem* for the damages to which they contributed.

Petitioners urge this Court to review its own holding in *Liverpool, Brazil and River Plate Steam Nav. Co.* v. *Brooklyn Eastern District Terminal,* 251 U. S. 48 (1919) as being outmoded and unrealistic. Although respondents ridicule this position, the Court of Appeals considered it a serious matter and would have held for petitioners had it not been for that case. Respondents ignore the fact that the holding in the *Liverpool* case has been severely restricted.

Respondent Jersey Central goes to considerable length in expounding on the legislative intent underlying the Limitation of Liability Act. The treatment of this Act by the Courts is also set forth in some magnitude; but it is interesting to note that respondents are primarily landbound carriers, and operate their proportionately small amount of maritime equipment solely to supplement their railroad and construction operations. It is submitted, therefore, that the cases and propositions presented by the respondent on this point are inapplicable to the present case.

Respondent railroad asserts (pp. 7-8) that the Rule in England is contrary to the position taken by petitioner. *The Harlow* [1922] Probate 175 is quoted to substantiate this argument. Respondent is in error: the Court in *The Harlow* held that where some vessels in a tow contributed to the casualty by their momentum or erratic movement, even though caused by persons on the tug, such towed vessels must be surrendered. In the present case all of the vessels in each tow, as a unit, blocked the Rincon Hills and thereby contributed to the grounding.

In *The Ran; The Graygarth* [1922] Probate 80 the facts were somewhat different and the Court held that the tow must be surrendered with the tug in order to benefit from limitation of liability. In the *Ran* case, a tugboat brought its tow into collision with a steamship. The tug Graygarth had in tow the Ran and two other craft. The Ran collided with a barge Para, sinking the latter vessel.

The owners of the Para brought suit *in rem* against the barge Ran; the tug owner petitioned for limitation of liability for the value of the tug Graygarth. The owners of the Para contended that the tug owner was entitled to limit liability on the basis of the aggregate tonnage of the Graygarth and the Ran, or alternately, on the tonnage of the Ran. The Court held that the tug owner in order to take the benefits of the limitation of liability act must put the value of the barge Ran into the fund. It should be noted that the suit was brought against the barge in rem and not against the tug. The Court on pages 86-87 stated:

> "* * * What then is the position where the tug and tow belonged to the same owners? In my opinion the tow was improperly navigated by the servants of the owners of the tow, although these servants may be upon the tug. It does not matter where they are. If they are the servants of the owners of the tow, and they are navigating the tow, the owners of the tow are liable for the negligence of the tow, and that is the vessel they are improperly navigating. The tug may be improperly navigated but that does not prevent the tow being also improperly navigated. * * * It seems to me that it obviously must be so. If you have got a vessel in tow, and she is improperly navigated by your servants who are in control of the navigation, it does not matter where they are, you are responsible for their improper navigation. I should have thought that was quite clear on principle, and I think it is clear on authority. I think it is shown by The Devonshire (1) in the House of Lords and by what I have read from The Quickstep (2)."

The value of the barge Ran was about £3000, which was the amount of damages suffered by the shipowner. The reason why the shipowner brought suit only against the Ran was because the value of the Ran put into the limi-

tation fund would be sufficient to cover the injuries sustained. It is clear from the excerpt of the opinion quoted above that the tow, when improperly navigated by those on the tug, is liable *in rem* for the tow's improper navigation by those on the tug. This is the position the petitioners take in the present case. The two flotillas blocked the Rincon Hills, not just the tugs. Each flotilla, as a unit, was on the wrong side of the channel. Each flotilla, as a unit, blocked the Range and forced the Rincon Hills aground.

While respondent Metropolitan's New York counsel contend that the *The Harlow* (1922) Probate 175 is contrary to petitioner's position, it should be noted that Canadian counsel, who might be in a better position to know Canadian and English law, filed a motion dated November 10, 1958, for leave to file a brief *Amicus Curiae*, and cited with two other cases *The Harlow* in support of his statement that had this case been litigated in Canada the tugs and their tows would have been considered as single units and the limitation fund calculated on the tonnage of the mass or flotilla.

Respondent Metropolitan's point (pp. 7-9) concerning uniformity of international maritime laws is retrogressive and unenlightened. Ships ply the waters of many nations. Uniformity is a practical necessity and desirable element in any law which applies to both domestic and foreign shipowners. Petitioners are asking this Court to modify the old rule in the *Liverpool* case and make it the more logical and just rule which prevails in Great Britain and Canada. This would not be a unilateral judicial adoption of the law of a foreign jurisdiction.

Nor is there any merit to the suggestion (p. 9) that uniformity on this matter should be accomplished by treaty, even assuming that the proposed International Convention dealing with limitation of liability will deal with the

specific question here concerned, where the tug and tow are under common ownership and where both the tug and tow contribute to the casualty. As indicated by respondent's own comment concerning the proposed new International Convention, it appears likely that such a convention would not be favorably received in the United States, and, it is evident, therefore, that respondent's suggestion of dealing with the present question by treaty is, in effect, a suggestion that the problem should not be dealt with at all.

This Court in the *Liverpool* case dealt with the problem by the Court construing the Limitation of Liability Act. Respondent gives no good reason why this Court should not at this time deal with the same question by re-examining in the light of present day circumstances its earlier construction of the statute.

Petitioners believe that a change is needed, not necessarily to follow the laws of a foreign nation *per se*, but that the latter's laws on the subject are more in keeping with the realities of present-day circumstances. See *Gulf Refining Company* v. *Atlantic Mutual Ins. Co.*, 279 U. S. 708.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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